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FURTHER PROMOTION AND ENCOURAGEMENT OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS, INCLUDING THE QUESTION OF THE PROGRAMME AND METHODS OF WORK OF THE COMMISSION

ALTERNATIVE APPROACHES AND WAYS AND MEANS WITHIN THE UNITED NATIONS SYSTEM FOR IMPROVING THE EFFECTIVE ENJOYMENT OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

Written statement submitted by the American Association of Jurists, a non-governmental organization in consultative status (Category II)

The Secretary-General has received the following written statement, which is circulated in accordance with Economic and Social Council resolution 1296 (XLIV).

[4 January 1994]

GE.94-10548 (E)

THE ROLE OF THE SECURITY COUNCIL IN THE DEFENCE AND PROMOTION OF HUMAN RIGHTS

1. The Security Council has in recent years been playing an increasing role in relation to gross violations of human rights. It could be argued that this exceeds the sphere of competence of the Council, whose primary responsibility, according to Article 24, paragraph 1, of the United Nations Charter, is the maintenance of international peace and security.

2. However, there are situations which, although fundamentally distinguishable as forming a pattern of gross violations of human rights, at the same time constitute a threat to international peace and security. It would seem unreasonable, moreover, to maintain that the different spheres of competence of the various organs of the United Nations are watertight compartments that are not interlinked.

3. The delicate and complex task of deciding whether the international community should intervene (and to what extent) in cases of massive violations of human rights which are all the more serious in that they also constitute a threat to international peace and security, must nevertheless be performed within the framework of strict observance of the United Nations Charter and, in particular, its fundamental principles, two of which are enunciated in Article 2, paragraphs 1 and 7: "The Organization is based on the principle of the sovereign equality of all its Members." and "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State ... ".

4. It is precisely the structure and functioning of the Security Council, the United Nations organ in which the victors in the Second World War reserved to themselves the power of decision-making, that are in contradiction with the basic principle laid down in Article 2, paragraph 1.

5. Furthermore, the right of veto, or the principle of unanimity of the five permanent members of the Security Council, on substantive matters and also on some procedural matters, enables any one of them to block a Council decision, even if the latter has the support of all the other members.

6. This is the so-called "Yalta formula", contained in a statement submitted jointly by the great Powers on 8 June 1945 to the San Francisco Conference, which considered and adopted the United Nations Charter. In its third paragraph the statement said in essence that all decisions of the Security Council that were of major political importance and could initiate a chain of events that might in the end require enforcement measures, were not procedural matters although they should normally be considered as such. In other words, under certain circumstances preliminary procedural questions were also subject to the right of veto by the major Powers. (See Alfred Verdross, Derecho Internacional Público, Ed. Aguilar, Spain, 1974, pp. 445-446 and Sidney Bailey, Voting in the Security Council, Indiana University Press, USA, 1969, pp. 12-15.)

7. Thus the present structure and system of functioning of the Security Council, which grants such privileges to five Member States, including through the right of veto, their virtual immunity from any attempt at collective

action within the framework of Chapter VII of the Charter (see the last part of Art. 27, para. 3), cannot guarantee the application of the principles of universality, objectivity and non-selectivity in the consideration of human rights issues.

8. These characteristics of the Security Council are the outcome of the Yalta Agreements, which established a bi-polar world and marked the start of the Cold War. That historic period has now come to an end, however, with the disappearance of one of the permanent members of the Security Council. The reference to the USSR in Article 23 is therefore obsolete, and Article 27, paragraph 3, the last lines of Article 108 and the last line of Article 109, paragraph 2, of the Charter are effectively superseded and should be considered as having lapsed.

9. The fact that the Russian Federation has entered the Security Council directly, without following the United Nations admission procedure laid down in Article 4 of the Charter, merely informing the Secretary-General that it was assuming all the rights and obligations of the USSR under the United Nations Charter, is not sufficient to maintain the validity of the aforementioned Articles and paragraphs. The reasons are, firstly, that the Russian Federation cannot be the successor of the USSR in the United Nations, since succession of States does not apply to membership of the United Nations, in accordance with the principle adopted by the Sixth Committee of the General Assembly (A/C.1/212 of 11 October 1947). (See: United Nations Conference on Succession of States in respect of Treaties, Vol. III, 1978, United Nations, p. 10.) Secondly, it is even less entitled to assume that seat with the privileges of the former USSR which are, essentially, legally, politically and historically non-transferable.

10. Hence, for the Security Council to be able to intervene legitimately and in the sphere of its competence (as generally defined in Art. 24, paras. 1 and 2, of the Charter) in matters relating to human rights, the General Assembly must first of all declare the need to amend Article 23 and to note the fact that Article 27, paragraph 3, the last lines of Article 108 and the last line of Article 109, paragraph 2, have lapsed, in other words, the extinction of the principle of unanimity of the five major Powers, which has become impossible to apply owing to the disappearance of the USSR.

11. When this matter is considered, account must be taken of the fact that in the second sentence of Article 24, paragraph 2, of the official Spanish version of the United Nations Charter the word "specific" does not appear ("The specific powers granted to the Security Council ..."), which is extremely important for interpretation of the Article. (See Hans Kelsen, The Law of the United Nations, London, Stevens and Sons Limited, 1950, pp. 270 et seq., in particular 288-292.)

12. The General Assembly, by resolution 47/62 of 11 December 1992 on the "Question of equitable representation on and increase in the membership of the Security Council", has opened the debate on amendment of Article 23 of the United Nations Charter.

13. The rational culmination of that process initiated within the General Assembly must be an increase in the number of members of the Security Council in order to adapt it to the present number of Members of the United Nations, taking account of equitable regional representation and the demographic and economic potential of States (or elimination of the status of permanent Member) and the removal of the right of veto.

14. This would help to avoid any arbitrary declaration by the Security Council that a situation constituted a threat to peace and security, and any use of its functions for purposes other than those provided for in the Charter or "as a pretext for the realization of ulterior purposes". (Dissenting opinion of Judge Fitzmaurice in the advisory opinion of the International Court of Justice, Order No. 1 of 26 January 1971, in I.C.J. Reports 1971, para. 116, p. 294.)

15. In the same advisory opinion Judge Gros stated: "To assert that a matter may have a distant repercussion on the maintenance of peace is not enough to turn the Security Council into a world government. The Court has well defined the conditions of the Charter: 'That is not the same thing as saying that [the United Nations] is a State, which it certainly is not, or that its legal personality and rights and duties are the same as those of a State. Still less is it the same thing as saying that it is a "super-State", whatever that expression may mean' (I.C.J. Reports 1947, p. 179)."